BRIEF IN SUPPORT OF PETITION

Statement of Case

We will use the abbreviation "R" for the Record.

The accident involved occurred January 13, 1939, at an intersection on the south edge of Colman, South Dakota. Decedent with a younger sister was driving southward on a graveled road, approaching an intersection of an arterial paved highway, on which Petitioner was driving westward.

The north and south road on which Decedent was traveling did not continue to the south of the paved highway. On both corners to the north of the paved highway were gasoline stations. As the north and south road approached the paving, the more heavily traveled portions forked out to the southwest and southeast, respectfully. (R. 19-21).

The north and south road was practically level. Approaching on the paved road from the east there was a slight raise with the peak a quarter of a mile from the intersection. From that point to the intersection the paving was almost level but with a slight downward grade. (R. 21). The stop sign on the north and south road was on the west side thereof at a point 109 feet north of the paving. From this stop sign visibility of the paved road to the east was obscured so that a motorist at the stop sign could see only a comparatively few feet to the east. (R. 30 near bottom of page; see also Exhibit 1, being a map drawn according to scale of 20 feet to the inch and which makes the situation as to visibility manifest).

Descriptive evidence as to the degree of visibility to the east, from various points between the stop sign and the paving, appears at various places in the Record. (R. 27, 30, 44-50, 38, 48, 29 and the various photographs which were introduced.) Summarized, the situation was about as follows: A motorist approaching the intersection from the north, when at a point about 50 feet north of the paving, would have a comparatively clear view to the top of the grade a quarter of a mile away. This would continue until he was at a point about 30 feet north of the paving. Then as he con-

tinued for a distance of about 10 feet, his view would be limited by the obstruction of a line of trees so he could see only from 150 feet to 380 feet, depending on the exact point where he was. At all times from a point 20 feet north of the paving he had a clear view for a quarter of a mile eastward.

There was no dispute as to the movement of the car driven by Decedent. At the stop sign (109 feet north of the paving) the car came to a stop. (R. 42). It then continued onward at 5 to 10 miles an hour, and did not make any further stop. (R. 31, 42). When the front end of the car was about 19 feet north of the paving, which would place the occupants in the front seat 25 feet from the paving, Decedent said, "I don't see anybody, do you?" to which her sister replied, "No, I don't," or something like that. (R. 40). The car then continued onto the paving.

The point of impact was identified by a mark found on the paving following the accident. One witness placed this as a foot to eighteen inches south of the center stripe, and another witness estimated that it was five inches or six inches south of the center stripe. (R. 21-22). The left front end of Decedent's car was struck by the right front wheel of Petitioner's car. (R. 21, 22 and 28). The paving was 20 feet wide. Decedent's car was approximately 14 feet in length. (R. 31). The brakes were in such condition that when applied at a speed of about 10 miles an hour it would stop within 10 feet. (R. 43). Immediately before the crash Decedent's car was following a circular course to the southeast, the front end at the moment of impact reaching a point just south of the center line and twelve feet east of the east edge of the intersection. (R. 22).

Therefore, decedent's car when collision occurred would have been pointed diagonally toward the southeast, with its front end at about the center line, and its rear end at about the north edge of the paving, entirely obstructing the north half of the paving, which was ten feet wide and the car fourteen feet long.

Petitioner's account of the accident was that when out on

the highway he had been driving forty to fifty miles; that he was slowing down before he came to the intersection; that he took his foot off the gas but did not put on the brake; that when probably one hundred twenty-five feet to one hundred fifty feet east of the east line of the intertion he first saw the decedent's car, then twenty-five feet to fifty feet from the north line of the intersection, meaning by the north line of the intersection twenty-five feet north of the paving, which would place the decedent's car fifty to seventy-five feet north of the paving; that decedent's car was traveling at about ten miles an hour (R. 23-24); that he slowed down to about twenty-five to thirty miles an hour; that decedent's car was coming so slowly that he thought it would stop before coming to the highway (R. 25); that decedent's car was close to the paving when he first realized it was not going to stop; that he put on his brakes and turned to the left to avoid the collision; that he was thirty to forty feet from the other car when he put on his brakes; that he also sounded his horn. (R. 26-27).

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

I.

In reversing the judgment of the United States District Court for the District of South Dakota, Southern Division.

II.

In construing the Uniform Motor Vehicles Act to the effect that a stop at a stop sign on a crossroad leading to an arterial highway constitutes compliance with the law, regardless of whether an effective observation at such point may be made.

III.

In construing the Uniform Motor Vehicles Act to the effect that a motorist entering such arterial highway has

the right-of-way over vehicles on such arterial highway coming from his right.

IV.

In stating the duty as to due care of a motorist about to enter an arterial highway.

V.

In applying the doctrine of the last clear chance.

THE LAW

The purpose of the Uniform Motor Vehicles Act is manifest. Interstate traffic in automobiles is now commonplace. It is highly undesirable that every time a motorist crosses a state line he should be confronted by a new and different set of traffic regulations. So the Uniform Motor Vehicles Act was proposed for general adoption to correct this confusion. Uniformity of interpretation is highly desirable. This is expressed in Section 69 of Chapter 251 of the South Dakota Session Laws of 1929, wherein the South Dakota Legislature adopted the Act. The same provision appears in Section 90 of the Act as proposed for general adoption. (11 Uniform Laws Annotated 73).

Therefore, judicial construction of important provisions of this Law is a matter of more than merely local importance. Any construction, particularly by a Federal Court, which is at variance with the general current of authority, tends to introduce confusion into regulations designed to be uniform.

So far as concerns interstate motor traffic, no subject could be of greater public interest than regulations concerning arterial highways. Practically all such interstate traffic is upon arterial highways. Hence, confusion in the law with reference to use thereof defeats the precise purpose for which the Uniform Motor Vehicles Act was proposed and widely adopted.

We earnestly urge that the decision of the Circuit Court of Appeals in this case will inevitably produce such confu-

sion. It is not only at variance in several important particulars with the apparent holdings of the South Dakota Supreme Court, but it is also at variance with the decided weight of authority of courts generally. We will endeavor to point these out sufficiently to show the reasons why Certiorari should be granted.

RIGHT OF WAY

The majority of the Circuit Court held that a motorist entering an arterial highway has the right of way over vehicles approaching on the arterial highway from his left. This was based on Section 19 of Chapter 251 of the South Dakota Session Laws of 1929, now Section 44.0318 of the South Dakota Code of 1939. The applicable portion thereof reads:

> "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right except as otherwise provided in Section 20. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder."

The statute with reference to arterial highways is Section 22 of the same Act, now Section 44.0321 of the 1939 Code. This reads:

> "The State Highway Commission with reference to state highways and local authorities with reference to highways under their jurisdictions are hereby authorized to designate main traveled or through highways by erecting at the entrances thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highways, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. All such signs shall be illuminated at night or so placed as to be illuminated by the headlights of an approaching vehicle or by street lights."

Construing these two statutes together the majority of the Circuit Court held that once a motorist makes a stop in obedience to a stop sign, he has the right of way provided by Section 19 over vehicles approaching from his left. This followed certain Minnesota cases which appear to hold this.

This is unquestionably of major importance. The result reached is not at all in conformity with the public conception of an arterial highway. The Court should have construed these two statutes together to give effect to the obvious purpose of the statutory authorization for establishment of arterial highways. This is in clear recognition of the requirements of modern rapid transit in motor vehicles. The provision is made so that there will be set apart specified highways for through traffic. This, of course, does not mean that motorists from intersecting highways can enter only at their own peril, but the purpose clearly is so that the motorist on the through highway can proceed with a reasonable sense of security against cars entering from intersecting roads. The requirement for a full stop necessarily implies that the motorist entering from an intersecting road will make careful observations in connection with the stop, and will not enter until such observations assure him that he can do so with reasonable safety, deferring to a reasonable extent to traffic on the through highway.

That, as a matter of fact, is what we all expect when we are driving on an arterial highway. The average motorist would be astounded if told that he must be prepared to give the right of way to any vehicle entering from his right; that it is incumbent upon him to anticipate that any vehicle from his right which in normal course of travel would get into the intersection at the same time he would, has the right to proceed, and that it is his duty to slow down and give the right of way to such vehicle.

Yet that is the effect of the decision of the Circuit Court of Appeals in this case. If it stands it will introduce into judicial construction of important provisions of the Uni-

form Act an element which will practically destroy the entire purpose of establishment of arterial highways.

The correct view would be to give a broad construction of the arterial highway statute, in full conformity with its obvious purpose and in conformity to the public understanding thereof. The correct conception is set forth in the following decisions:

Findley v. Brittenham, 199 Minn. 197, 271 N. W. 449.

Gumm v. Koepke (Wis.—State Report not available) 278 N. W. 447.

Hittle v. Jones, 217 Ia. 598, 250 N. W. 689.

Marciniak v. Sundeen, 278 Mich. 407, 270 N. W. 729.

Miller v. Stevens, 63 S. D. 10, 256 N. W. 152.

Paluczak v. Jones, 209 Wis. 640, 245 N. W. 655.

Pettera v. Collins, 203 Wis. 81, 233 N. W. 545.

Pulford v. Mouw, 279 Mich. 376, 272 N. W. 713.

Shoniker v. English, 254 Mich. 76, 235 N. W. 866.

Svenson v. Vondrak, 200 Wis. 312, 227 N. W. 240.

Wood v. Branning, 215 Ia. 59, 244 N. W. 658.

South Dakota Code of 1939 (cited SDC), Section 44.0321, Vol. 3, Page 199.

POINT AT WHICH MOTORIST ENTERING ARTERIAL HIGHWAY IS REQUIRED TO STOP

The question presented is: a stop sign on a crossroad entering an arterial highway is so far from the intersection that a motorist from that point would have practically no view of the arterial highway approaching the intersection. In such case does such a motorist comply with the law when he stops at the stop sign, and makes no other stop? The Circuit Court of Appeals answered this question in the affirmative. We contend this is clearly incorrect.

The applicable statute, being Section 22 of Chapter 251 of the South Dakota Session Laws of 1929, now Section 44.0321 of the South Dakota Code of 1939, has previously

been quoted in full. It requires that, when a highway has been designated as arterial by erection of stop signs at entrances thereto from intersecting highways, there is required "a full stop before entering or crossing such designated highways."

The precise point of the stop is not specified. In view of the obvious purpose of the statute it must mean a stop at a point where the motorist can make reasonably adequate observations of traffic on the arterial highway. This is the construction such a statute has almost uniformly received.

Gumm v. Koepke (Wis. State Report not available) 278 N. W. 447.
Hittle v. Jones, 217 Ia. 598, 250 N. W. 689.
Marciniak v. Sundeen, 278 Mich. 407, 270 N. W. 729.
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Shoniker v. English, 254 Mich. 76, 235 N. W. 866.
Svenson v. Vondrak, 200 Wis. 312, 227 N. W. 240.

The South Dakota Supreme Court in *Miller v. Stevens*, 63 S. D. 10, 256 N. W. 152, indicates the same view.

This is a question of major importance in the construction of the Uniform Motor Vehicles Act. As chief arteries of motor traffic are now constructed, presence of filling stations or other structures frequently precludes placing the stop sign up close to the intersection—just as it did here. It is of real interest that the purpose of the Uniform Act as to arterial highways be preserved. The statute in question has as its clear objective a requirement that a stop be made where traffic conditions can be observed. If the interpretation of the majority of the Circuit Court of Appeals stands, the law as to this point will be badly confused. The cases cited by the Circuit Court to sustain its position are not applicable. They do not hold a stop sufficient when made at a point where the stop would be entirely ineffective. The Circuit Court's decision is the first that introduces into the Uniform Motor Vehicle Act any such construction of the law.

CONDUCT OF MOTORIST APPROACHING AN INTERSECTION

The Circuit Court reached the conclusion that Respondent's decedent may not have been negilgent. This conclusion was reached on the theory that she could assume Petitioner was not driving at an unlawful rate of speed and that she "may have seen the defendant approaching and believed because of his distance away, that she had ample time to cross to the south side of the pavement." It was undisputed that decedent was driving at only five to ten miles and could have stopped within ten feet.

This sets forth a requirement on a motorist entering an intersection that is much more lax than that stated by the South Dakota Supreme Court. The law of South Dakota is set forth in *Jamieson v. Gerth*, 61 S. D. 514, 249 N. W. 921. This directly rules that such a motorist may not under such circumstances rely on an observation and a mental calculation when an approaching vehicle is a considerable distance from the intersection, but that when he has once seen such a vehicle he must look again before finally committing himself to the zone of danger. This decision was followed in *Anderson v. Huntwork* (not yet published in South Dakota reports) 284 N. W. 775. Precisely the same rule was earlier stated in *Miller v. Sioux Falls Traction System*, 53 S. D. 649, 222 N. W. 270.

This question concerns a rule of law that controls the daily habits of the thousands of motorists in the jurisdiction. The highest Court of the state, in the decisions cited, has seen fit to adopt a construction of the law which requires a high degree of care from a motorist entering an intersection. The Circuit Court in this decision construes the law as requiring a much lesser degree of care. If the decision stands it will result in the Federal Courts of the jurisdiction applying an entirely different rule than that which is in force in the State Courts of the jurisdiction.

LAST CLEAR CHANCE

The majority of the Circuit Court held that, even if Re-

spondent's Intestate was guilty of contributory negligence, the case could have been submitted to the jury on the doctrine of the last clear chance. This was on the theory that Petitioner testified that he first realized Decedent was not going to stop when her car was ten to fifteen feet to the north of the paving, that on his own testimony he must have been several times as far away as that, and yet he did not apply his brakes until he was thirty or forty feet from the point of collision; further, that he could have turned to the right of Decedent's car. This states and applies the doctrine of the last clear chance entirely differently than it has been stated and applied by the South Dakota Supreme Court. *Miller v. Sioux Falls Traction System*, 44 S. D. 405, 184 N. W. 233; *McFarland v. Chicago, Milwaukee and St. Paul Railway Company*, 51 S. D. 85, 212 N. W. 493; *DeNoma v. Sioux Falls Traction System*, 39 S. D. 10, 162 N. W. 746. It is also entirely different than it has been previously stated and applied by the Circuit Court of Appeals of the Eighth Circuit. *Denver City Tramway Company v. Cobb*, 164 Fed. 41; *McFarland v. Chicago, M. & St. P. Ry. Co.*, 51 S. D. 85, 212 N. W. 493; *Walker v. East St. Louis Street Railway Company*, 25 Fed. (2) 579; *Wheelock v. Clay*, 13 Fed. (2) 972.

The error of the majority of the Circuit Court in applying the doctrine is obvious from the following statement in the opinion:

> "This case might have been submitted to the jury on the theory that it was the duty of the defendant in driving his automobile upon the highway to exercise reasonable care by keeping a lookout ahead, by driving at such speed and in such manner as to have his automobile under reasonable control so as to be able to stop at the intersection when he saw, *or by the exercise of ordinary care could have seen*, the decedent in the act of driving into said intersection and in a position of peril, and if the defendant had used such care he could have stopped, or reduced his speed, or turned to the right and thus have avoided the accident, but failed to do so, then the plaintiff was entitled to recover."

This introduces into the doctrine a vital feature which has been entirely rejected by the South Dakota Supreme Court. Under the local decisions above cited the doctrine applies only when it is shown that the defendant did actually himself observe a clear chance to avoid the collision, and did not take advantage of it. To hold, as the majority of the Circuit Court held, that it is sufficient if the defendant by the exercise of reasonable care would have observed plaintiff's peril, broadens the doctrine so it would apply to nearly every autmobile collision case.

Further, the facts were not such under the local decisions as to make the doctrine applicable. It is undisputed that the front end of Decedent's car had reached only about the center line of the paving when the crash occurred. The rear-end would necessarily have been at the north edge of the paving, entirely obstructing Pettioner's right hand half of the paving. If he had attempted to go to the right, he would necessarily have gone off the paving and onto the north shoulder. This would mean that, if, as would obviously be likely, Decedent should see him and stop before going onto the paving, he would crash into her car and cause an accident which would not otherwise occur. Petitioner's testimony at R. 23-27 is not such as to give any basis whatever for a conclusion that would make the doctrine applicable.

This is also important. Under the rule promulgated by the South Dakota Supreme Court, the doctrine of the last clear chance is rarely applicable to an automobile accident case. This is obvious from the very few decisions in which that Court has dealt with the doctrine in recent years. *On a very careful search we do not find a single decision of the South Dakota Supreme Court, rendered within the last fifteen years, that has sustained a recovery for the plaintiff on the basis of the doctrine of the last clear chance.*

The decision of the majority of the Circuit Court is obviously such that if it stands this doctrine will be the basis for recovery in a large portion of automobile accident cases which get into the Federal Court of the jurisdiction.

PROPRIETY OF GRANTING WRIT IN THIS CASE

It is true that the judgment of the Circuit Court of Appeals directs a new trial in the District Court and that, therefore, the litigation is not finally terminated. However, it is proper to grant the writ in such an instance when it is to the public interest to prevent confusion entering into the construction of the law in Federal Courts.

Chicago, Burlington and Quincy Railroad Company v. Willard, 220 U. S. 413, 31 Sup. Ct. Rep. 460.

Spiller v. Atchison T. & S. F. Railway Company, 253 U. S. 117, 40 Sup. Ct. Rep. 466.

Gay v. Ruff, 292 U. S. 25, 54 Sup. Ct. Rep. 608.

Such is the case here. In view of the almost universal use of motor vehicles, the law regulating use of the same affects the daily lives of most people. To refuse the writ because the case has not reached a final judgment as between the litigants would in all probability mean that the errors in the Circuit Court decisions would never be corrected by this Court, and that the same would stand for years as the law of the circuit, with resulting confusion as to the law regarding use of arterial highways, and with the Federal Courts in South Dakota applying entirely differently than the State Courts the doctrine of the last clear chance, and the rule of law as to the degree of care required by a motorist entering an intersection.

THE FACT THAT THE CIRCUIT JUDGES DIVIDED AND THAT THE DECIDING VOTE WAS BY A DISTRICT JUDGE CONSTITUTES REASON FOR GRANTING THE WRIT

This is directly stated in *Forsythe v. City of Hammond,* 166 U. S. 506, 17 Sup. Ct. Rep. 665. Pointing out the reasons for granting certiorari, this Court said, among other things:

"As the Courts of Appeal would often be constituted

of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the question involved."

SUMMARY

There are strong reasons for granting the writ in this case.

It is necessary:

First, to prevent a conflict between the Federal Courts and the South Dakota Courts in applying the law as to the last clear chance and as to the degree of care required of a motorist approaching an intersection, and probably also as to other questions involved.

Second, to prevent confusion in the Eighth Circuit in the construction of the Uniform Motor Vehicles Act, particularly as to the requirement for a stop by entering motorists, and as to right of way at intersections.

It is, therefore, respectfully urged that this case is such as to call for review by this Court.

Respectfully submitted,

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